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February 3, 2012

231796

Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

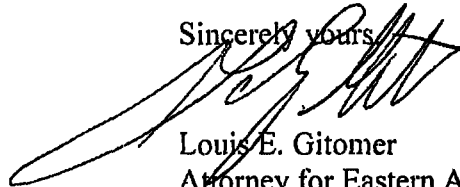
RE: **Finance Docket No. 35583, *Eastern Alabama Railway LLC v. Utilities Board of the City of Sylacauga***

Dear Ms. Brown:

Enclosed is an Appeal filed by the Eastern Alabama Railway LLC.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer  
Attorney for Eastern Alabama Railway LLC

Enclosure

**FEE RECEIVED**

FEB 06 2012

**SURFACE  
TRANSPORTATION BOARD**

**ENTERED  
Office of Proceedings**

FEB 06 2012

**Part of  
Public Record**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. FD 35583

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EASTERN ALABAMA RAILWAY LLC  
v.  
UTILITIES BOARD OF THE CITY OF SYLACAUGA

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APPEAL

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**EXPEDITED HANDLING REQUESTED**

Scott G. Williams Esq.  
Senior Vice President & General Counsel  
RailAmerica, Inc.  
7411 Fullerton Street, Suite 300  
Jacksonville, FL 32256  
(904) 538-6329

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Attorneys for: EASTERN ALABAMA  
RAILWAY LLC

Dated: February 3, 2012

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**EXPEDITED HANDLING REQUESTED**

*In Eastern Alabama Railway LLC-Petition for Declaratory Order*, Docket No. FD 35583 (STB served January 27, 2012), the Surface Transportation Board (the “Board”) correctly opened a declaratory order proceeding to determine whether “the proposed condemnation of certain of its property by the Utilities Board of the City of Sylacauga, Ala. (Utilities Board), is preempted by federal law under 49 U.S.C. § 10501.” However, Eastern Alabama Railway LLC (“EARY”) contends setting an expedited schedule and denying EARY discovery was a clear error of judgment and will create manifest injustice. Therefore, EARY files this Appeal of the procedural schedule pursuant to 49 C.F.R. §1011.6(b).

Pursuant to authority delegated under 49 C.F.R. §1011.6(c)(1), the Acting Director of the Office of Proceedings established an exceptionally expedited schedule based on the allegation in the Reply dated January 19, 2012 (the “Reply”) by the Utilities Board of the City of Sylacauga, Alabama (the “Utilities Board”) that it needed to construct a sewer line by April 1, 2012 in order to serve a new customer, IKO. It turns out that IKO will also be a new customer of EARY, and EARY has not heard that IKO will begin operations by April 1, 2012. Indeed, in discussions

with the IKO contractor, EARY has been told that the local contractor does not know when the sewer is needed.

By requiring the record in this proceeding to be completed by February 21, 2012, the Board has denied EARY any opportunity to obtain discovery from the Utilities Board. And EARY contends that discovery is required because its experience with other crossings of its property by the Utilities Board have led to interference with rail operations and undue safety risks. Although the Utilities Board argues that it “is willing to follow reasonable safety measures, apply reasonable technical specifications, and cooperate with EARY in scheduling its construction work” (Reply at 3), EARY’s experience with the Utilities Board indicates otherwise.<sup>1</sup>

The Utilities Board mentions the crossings of EARY that exist, however it does not indicate when those crossings occurred, whether they are there as a result of condemnation or agreement, and that the Utilities Board has unilaterally canceled all of the agreements governing its relations with EARY. More importantly, the Utilities Board has not informed the Board of (1) the incident that occurred in April 2009 when a maintenance-of-way contractor engaged by EARY collided with a line that the Utilities Board was stringing over the railroad tracks without prior notice to EARY, (2) the incident in August 2009 when EARY discovered that the Utilities

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<sup>1</sup> The Utilities Board even argues that the second pipeline “would not require setting foot upon the surface of the EARY right-of-way. Reply 2-3. It then starts backtracking when it states that it will “briefly require occupying part of the rail right-of-way, but these are typically the edges of the right-of-way.” Reply at 3, fn 3. Further backtracking occurs when it “would only need to use the surface area to meet its statutory duty to paint-mark the underground pipelines.” Reply at 3. So the Utilities Board has changed its argument from not using the surface, to only using the edges, to using the entire surface area over the easement to comply with undefined state requirements. And EARY and the Board are left to wonder whether the Alabama requirements will require the Utilities Board to impede rail service or pose undue risks.

Board had entered the railroad right-of-way without knowledge of EARY to mark the location of utilities on the **rail** itself from MP 467 to MP 461.5, (3) the incident in August 2009 when EARY discovered a man walking along the tracks without any personal protective equipment and who identified himself as an appraiser hired by the Utilities Board, (4) the incident in October 2009 when EARY discovered unprotected contractors on the track again marking the Utilities Board's utilities without prior notice, (5) the boring under EARY's track at MP 462.4 and MP 468.8 performed from June 10, 2010 to June 14, 2010 after significant time, money and resources had been expended by EARY to defend threats by the Utilities Board that it was going to enter the right-of-way and perform surface construction work without protection, without compliance with customary engineering standards of construction and without regard to any interference with railroad operations or potential damage to roadbed, track, equipment and personnel, (6) the incident in April 2011 when EARY's customer, Heritage Plastics, was told by the Utilities Board that there was an unprotected pipe under the railroad tracks that needed to be corrected without informing EARY of the danger to the roadbed, tracks, equipment and personnel, (7) the incident in October 2011 when the Utilities Board informed EARY that it had a broken fiber optics line that needed replacement and such work would be performed without protection and, despite EARY's objection, the Utilities Board's employees entered the right-of-way to perform said work before being instructed to vacate the property until certain requirements were met, including compliance with 49 C.F.R. §214 *et seq.*, (8) the incident in October 2011 when a subgrade pipe owned by the Utilities Board<sup>2</sup> had a water leak that flooded EARY's right-of-way near MP 458.39 such that train operations were suspended, and (9) the incident in November

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<sup>2</sup> Ownership of the same pipe had been disclaimed by the Utilities Board in a meeting with EARY's representatives in September 2011.

2011 when EARY discovered employees of the Utilities Board in a boom attached to a vehicle over the right-of-way and said employees denied being on EARY's property because they were "over" said property. All of these and numerous other events over the last several years have impeded rail service and posed undue safety risks.

The Utilities Board also adopts the false premise that it is interested in not constructing a longer more expensive alternate sewer line.<sup>3</sup> The Utilities Board goes on to claim the obvious – it is a government entity and non-profit. If the Utilities Board were truly interested in any of the claims it makes, it would have entered an agreement with EARY in lieu of bringing the condemnation action.<sup>4</sup> By entering a contract with EARY, the Utilities Board would have eliminated litigation costs and been able to expeditiously construct the pipeline without interfering with EARY now and into the future. But the Utilities Board elected to litigate instead of negotiate. EARY suggests that the Board should not reward self-inflicted costs and delays with a procedural schedule that eliminates EARY's right to discovery. EARY contends that discovery is necessary so that EARY and the Board can ascertain the Utilities Board's true intentions, including its proposed construction process and engineering designs.

EARY will not seek over broad discovery. EARY will request the Utilities Board's construction plans, safety measures, technical specifications, schedule, the engineering requirements of the pipeline, and whether the Utilities Board has the benefit of sovereign immunity in which case negotiations and an agreement containing provisions common and

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<sup>3</sup> Based on a \$500,000 cost and 6,112 customers, the burden would be a little less than SEVEN DOLLARS PER MONTH per customer.

<sup>4</sup> Attached as Exhibit 1 is a letter from the Utilities Board dated June 17, 2008 and in which the Utilities Board terminated all agreements with EARY for the right to use EARY's property. Since then, the Utilities Board has not paid EARY any money for use of EARY property, flagging protection, interference with train operations, etc.

standard in the rail industry are vital to protect EARY from harm caused by the Utilities Board's facilities, which include water pipelines, gas pipelines, cables and electrical wires, as exemplified above in the numerous incidents that have occurred in the last few years due to the indifference of the Utilities Board to EARY's railroad operations and safety.

EARY contends that it has demonstrated that the expedited schedule without discovery was a clear error of judgment and that the Board can prevent manifest injustice by authorizing an extension of the schedule to permit EARY to take limited discovery from the Utilities Board.

Respectfully submitted,

Scott G. Williams Esq.  
Senior Vice President & General Counsel  
RailAmerica, Inc.  
7411 Fullerton Street, Suite 300  
Jacksonville, FL 32256  
(904) 538-6329

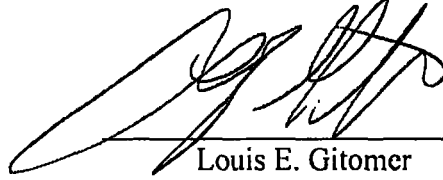
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Lou@lgrailaw.com

Attorneys for: EASTERN ALABAMA  
RAILWAY LLC

Dated: February 3, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing document to be served upon counsel for Utilities Board of the City of Sylacauga electronically and by pre-paid first class mail.



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Louis E. Gitomer  
February 3, 2012



## EXHIBIT 1



UTILITIES BOARD  
City of Sylacauga  
301 N. Elm Ave  
P O Box 207  
Sylacauga, AL 36150  
(256) 742-8301

UTILITIES BOARD  
OPERATIONS CENTER  
3411 Edgewood Dr  
Sylacauga, AL 36150  
(256) 742-8301

June 17, 2008

Certified Mail Tracking Number: 7006 3450 0003 6738 6064

Ms. Staci Korpai  
Rail America, Inc.  
5300 Broken Sound Blvd., NW  
Boca Raton, Florida 33487

Subject: Letter dated June 9, 2008 (Copy Attached)  
The Utilities Board of the City of Sylacauga, Alabama

Dear Ms. Korpai;

We have reviewed your letter dated June 9, 2008 and would like to address the following issues.

1. Your invoices were received in our office during the month of December 2007. At which time, our office requested documentation of your ownership of the property to which this billing is attached. As of this date, no documentation has been provided to the Utilities Board of the City of Sylacauga, Alabama by East Alabama Railway and/or Rail America.
2. In February of 2008, you continued to bill our office for these crossing locations without providing any requested documentation of the ownership by East Alabama Railway and/or Rail America of the aforementioned property. At which point, we contracted with Eagle 1 Resources to investigate this matter on our behalf.
3. On March 3, 2008 and March 21, 2008, our consultant - Eagle 1 Resources, contacted your office requesting you provide documentation of your ownership of the aforementioned property in Sylacauga, Alabama. It is our position that failure to possess the proper ownership rights is a violation of material terms to the lease. This information was received in your office on March 5, 2008 and March 25, 2008, respectfully.
4. On April 22, 2008, our consultant - Eagle 1 Resources, provided your office with a notice of termination of the lease agreements with your company. This

letter was received in your office on April 24, 2008. It has been approved by our board to cancel these lease agreements based on your lack of documentation to substantiate your ownership of the land at each of our crossing locations.

5. On May 5, 2008, your office provided correspondence with Mr. David L. Thomas of Eagle 1 Resources to state that the lease agreements could only be terminated by the owners. Eagle 1 Resources was acting as our agent for this work. Your office continues to provide no documentation of the ownership of the land for each of the crossing locations. Failing to possess proper legal ownership is a material violation to the terms of the lease.
6. To remove all doubt at this time, we (The Utilities Board of the City of Sylacauga, Alabama) are notifying Rail America and/or East Alabama Railway that we are terminating the lease agreements between the Utilities Board of the City of Sylacauga, Alabama and East Alabama Railway and/or Rail America effective today, June 16, 2008. It has been determined that these lease agreements were developed under false land ownership information and were void from the date of conception.
7. On May 20, 2008 (received in your office on May 22, 2008), our consultant - Eagle 1 Resources, provided you with
  - a. A history of the railroad line installed in the Sylacauga Alabama area.
  - b. A summary of the land ownership issue along with a review of the quit claim deed you received in 2000 from CSXT Railroad.
  - c. A summary of the Right of Way (not land ownership) you own in this area.
  - d. A summary discussing the legality of lease agreements entered into under false land ownership information.

If you do pursue this issue in the court system, we are extremely interested to learn how you will prove your ownership of certain parcels of land in the Sylacauga, Alabama area. The city was first incorporated as Sylacoga in 1838 and again in 1887 as Sylacuga. In consideration that the city of Sylacauga was incorporated in 1838 (48 years before the construction of the railroad) and the city streets were established at this time (1838). It will be interesting to learn how the railroad owns a public street. Understanding that a railroad can not condemn a public street for private ownership, your ability to address this issue must be incredible.

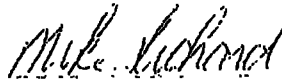
In closing, we respect your right to determine your options under the laws governing this issue. We also have rights and potential financial compensation for the past transgressions with our organization. If you chose to pursue this in court, that is your right. However, please note that once the flood gates of information is released to the

members of the class with this same invoicing issue, it will be impossible to stop the potential damage to your organization.

If you chose to pursue this illegal invoice issue with a third party collection agency, we will take the necessary legal action to protect our firm. Rail America and/or East Alabama Railway will be held liable for any damage to our organization due to your actions

Sincerely,

The Utilities Board of the City of Sylacauga, Alabama

A handwritten signature in black ink that reads "Mike Richard". The signature is written in a cursive, flowing style.

Mike Richard

General Manager

cc; Mr. David L. Thomas

Eagle 1 Resources  
Auburn, Alabama

Mr. Blake Costello

Railroad Management / Dallas, Texas